Supreme Court U.S.

No. 05-1345

In The

# Supreme Court of the United States

UNITED HAULERS ASSOCIATION INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

*Petitioners,*

*v.*

ONEIDA HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

*Respondent.*

***On Writ of Certiorari to the United States Court of Appeals for the Second Circuit***

## BRIEF FOR *AMICUS CURIAE* FEDERATION OF NEW YORK SOLID WASTE ASSOCIATIONS IN SUPPORT OF RESPONDENTS

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# BRIEF FOR *AMICI CURIAE* ROCKLAND COALITION FOR DEMOCRACY & FREEDOM, and the ROCKLAND COUNTY CONSERVATION ASSOCIATION

## STATEMENT OF INTEREST OF THE AMICI CURIAE

This *amici curiae* brief[1] is submitted on behalf of two volunteer citizens' groups, the Rockland Coalition for Democracy and Freedom ("RCDF"), and the Rockland County Conservation Association ("RCCA"), each located in Rockland County, New York, approximately 200 miles south of Oneida and Herkimer counties. Your *amici* have no economic interest whatsoever in the Oneida-Herkimer system. Your *amici*, however, have a strong interest in the public interest, principles of democracy, and the local, regional, national and international environment.

Your *amici's* counsel, Michael Diederich, Jr., is a member of both organizations. He has a longstanding interest in the subject of flow control, beginning with his preparation of an amicus brief on behalf of Rockland County in the *Carbone*[2] case, when he served the public as an assistant county attorney. Before serving a one year tour of active military duty in central Iraq, he briefed and argued in support of Respondent in the *United Haulers I* appeal,[3] which decision

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[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae's* counsel Michael Diederich, has made a monetary contribution to the preparation or submission of this brief. The Petitioner and Respondent have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

[2] *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

[3] *United Haulers Assn v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001). Counsel argued for an *amicus*.

is on review here. He has written a number of articles and otherwise been involved in the subject of solid waste flow control.[4]

The RCDF and RCCA are both longstanding local citizen organizations, entirely volunteer, whose members reside in Rockland County. The RCDF has for over a decade focused on issues relating to the First Amendment and democracy. The RCCA has, since being founded in 1930 as a not-for-profit corporation, taken a leadership role on environmental and conservation issues in Rockland County and the region. Your *amici* view a local government's ability to control its own people's trash in an economical and environmentally sound manner as important to both democracy and the natural environment. Accordingly, your *amici curiae* urge affirmance.

## FACTS

The governmental Respondents, from the point of view of your *amici*, engage in prudent, democratically chosen, local waste management. Your *amici* support this. Your *amici* believe that state and local government should constitutionally be permitted to engage in waste management which is sound and comprehensive. Moreover, future conditions may warrant even more thorough local efforts, for

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[4] *See, e.g., Does Garbage Have Standing?--Democracy, Flow Control and Solid Waste Management*, 11 PACE ENVT'L L. REV. 157 (Fall 1993); *Treatise Chapter: Municipal Solid Waste Management*, NEW YORK ENVIRONMENTAL LAW SERIES (Lawyers Cooperative, 1995); *Can Municipalities Manage Their Own Solid Waste*, ENVIRONMENT MAGAZINE (May 1995); *Practitioner's Perspective: In Light of Carbone: Who Owns Municipal Solid Waste?*, THE NEW YORK ENVIRONMENTAL LAW REPORT (April 1995); *Keep Democratic Rule over Trash*, ABA SECTION OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW, Nov./Dec. 1994; *Garbage and the Constitution: Democracy Collides with the Commerce Clause*, N.Y.S. BAR ASSOCIATION'S ENVIRONMENTAL LAW SECTION JOURNAL (May 1994).

the benefit of the people and the environment.

The people of the State of New York, and the voters of Respondent Oneida and Herkimer Counties through their elected representatives, have authorized the Oneida-Herkimer system. They have taken the words of Congress, expressed in RCRA, to heart, by creating a system of semi-monopoly public control over the communities' solid waste which allows private sector haulers to operate within the State-authorized monopoly system. This is a monopoly designed to benefit the public, including both the local and the national interest.

If every community in the country adopted this, or an even more aggressive system of waste management practice eradicating the citizenry's locally generated solid waste, the national policy goals of RCRA will have been achieved in a manner consistent with the vision of Congress. The citizens of the community, the State and the country would benefit. The Nation's environment, and even the Earth's, will be better protected, because with less waste comes more efficiency, less unnecessary natural resource consumption (for example, the creation of excess packaging and unnecessary "throwaway" products), and less natural resource damage related to waste disposal (unnecessary landfill space, transportation, air pollution and other environmental "externalities").

***"Title to trash"—in the people and their government***

As "average citizens," your *amici* observe that the Oneida-Herkimer system requires, through its counties' "flow control" laws, that all the citizenry's trash placed curbside be brought to the system's public facilities. If a similar flow control ordinance were in effect in Rockland County, as we believe there is with regard to at least some components of the waste stream, we would presume the ordinance legal, and that the trash collection firms whom we pay to pick up the trash would be required by operation of

law to bring our trash to our designated public facilities.

Our members would not ordinarily ask our trash collectors this directly. Rather, we would expect them to abide by the local law, with their interest in our trash lasting only as long as the short trip to a local designated disposal site, for example, a public landfill, waste to energy plant, recycling facility or transfer station. We would expect nothing different than, by analogy, the local school bus company bringing our children to the local public schools, or that the constable bringing criminals to the local jail, or a public water company the water to our faucets, or the sewer district our sewage to the treatment plant.

As a form of personalty, we would expect that our trash collector is merely a temporary bailee of our trash, under a constructive bailment required by local flow control laws to bring the trash to our public facilities.

***Expectation of Proper Trash Management***

As to our carters who bring trash to our public facilities, we would not anticipate that our local government would allow improper or environmentally unsound disposal. Nor would we expect that our local government would discriminate against out-of-state or out-of-county waste management firms.

Rather, we would expect proper public management of our trash by our agencies of government, in a manner consistent with State law, and consistent with long-range solid waste management planning conducted by our county in establishing a State-required solid waste management plan under the guidance provided by federal law (RCRA) and federal agencies (the EPA). We also expect value and competition from our tax dollars, not discrimination, cronyism or political patronage.

As citizens, we believe we have the right to compost our own "green" (organic) household wastes, or to bring our

glass and aluminum cans ("recyclable waste") to a recycler,[5] and it seems to us that we also have the right to collectively perform such "waste management" either as a neighborhood, or as a village, town, county or bi-county effort.[6]

And we are, as citizens, cognizant that natural resources are not unlimited; that scarcity of disposal sites and transportation costs create uncertainty regarding our community's future abilities to dispose of our solid waste; and that improperly managed municipal solid waste can result in pollution (sometimes accidental, sometimes not), thereby threatening the natural environment and our taxpaying pocketbooks. We rely on our local government to properly manage our wastes.

***Benefits to Rockland and New Jersey citizens, if Oneida & Herkimer counties manage its trash locally***

In examining the Oneida-Herkimer system, located 200 miles away from Rockland County, we see only benefit to us if its citizens, through its monopoly system, manage their own solid wastes properly. The local management by our upstate friends will result in less transportation of raw trash, for example, fewer garbage trucks traveling down the N.Y.S. Thruway and over the Tappan Zee bridge or into neighboring New Jersey, and fewer garbage barges being towed down the Hudson River.

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[5] We can also sell scrap metal to a junk yard, or return our 5 cent deposit cans to the grocer, but these items are not "waste," because they have value. The only material at issue in this appeal is solid waste—valueless material which we "pay to get rid of."

[6] Solid waste management should be at the appropriate level of government. In this, we find guidance from both federal and state law describing appropriately sized units of government to manage the citizenry's solid waste. *See, e.g.*, Resource Conservation & Recovery Act ("RCRA") § 4002 (a)(planning units), § 4006 (c)(3)(local plans) & § 4009 (rural counties assistance).

Moreover, the consolidation of waste which is "recyclable" within the Oneida-Herkimer system will result in an improved ability to manage the recyclable material. Consolidation of material will help create better, and new, markets for the re-use of such waste. Source separation of specific materials, such as aluminum and newsprint will transform previously valueless waste into material with value, via economies of scale. Thus, while fewer garbage trucks or barges of raw garbage may pass through our county and northern New Jersey, we might expect an increase of recycled material, which recycling benefits not only the environment, but also the economy.

However, a public waste management system is needed to accomplish such waste reduction and recycling. Aluminum cans and newsprint are thrown away by residents precisely because this is, to them, mere waste. Planning, education and government action are needed to create order and discipline over our trash, for example, to determine which recyclable materials households should set out at the curb for collection.

***Loss of Democracy***

Finally, it is of great concern to your *amici* if this Court is to hold that they cannot, through their representative government, self-manage their locally-generated solid waste.

Your *amici* believe that responsible citizens should expect, and demand, that their government act on their behalf. Of course, government must be respectful of individual rights, and also avoid conflict with government of other communities. State and local government certainly should not take action which discriminates against the citizens (or the businesses) of other States.

Democratic choice also allows a citizenry to employ the private sector to assist with managing problems. If we, through our county government, choose to contract for

landfill disposal available at the landfill owned by Sussex County, Virginia, this should be our democratic right, and the State of Virginia should not be allowed to prevent our contracting for the use of Sussex County's landfill, if other communities use it. New York City finds that it needs to export its trash. This Court protects such democratic choice under its *Philadelphia v. New Jersey*[7] case law.

At the same time, as ethically responsible citizens, we prefer that every community "do the right thing" by self-managing its own waste, if possible, as this makes common sense, and comports with the "proximity principle" of environmental law, that pollution problems are most efficiently managed closest to the source. Landfilling our county's waste in Virginia, and burdening New Jersey's and Maryland's highways in the process, makes no sense if we can reduce and manage the waste ourselves, locally.

## POINT I
## THE GUARANTEE CLAUSE PROMISES DEMOCRACY, INCLUDING OUR LOCAL GOVERNMENT'S ABILITY TO MANAGE OUR TRASH

The Guarantee Clause[8] promises the American people a "republican form of government." It is a guarantee of representative democracy. Democracy is the heart of our country. We have successfully exported it overseas, to post-war Germany and Japan. We are trying to establish it in Iraq. We take it seriously nationally and internationally. We must take it seriously locally.

Elected officials at every level of government represent the people. The "subsidiarity principle" of government,

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[7] *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). *See also, Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 511 U.S. 93 (1994); *Oregon Waste Services v. Department of Environmental Quality*, 511 U.S. 93 (1994).

[8] U.S. *Constitution,. art. 4, § 4.*

implicit in the Tenth Amendment and the principles of federalism, is that government is best run closest to the people.[9]

The Court knows its role in our federal system of government. It sometimes makes adjustments. For example, it sought to protect principles of federalism in *National League of Cities v. Usery*, 426 U.S. 833 (1976), where it recognized various traditional activities of the local government such as law enforcement, schools and sanitation, but later decided to defer to the national political process and structure of our federal system in protecting state and local sovereignty. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Notwithstanding, the Court in *United States v. Lopez*, 514 US 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) made clear that federal legislative powers are not without limits under the affirmative Commerce Clause,[10] invalidating federal regulation of guns at schools and violence against women because such are matters of state concern not sufficiently affecting interstate commerce.[11] Respectfully, waste reduction or eradication, because it is socially beneficial, has no adverse effect on interstate commerce whatsoever. These should, therefore, be viewed as posing less potential adverse effect on interstate commerce than the effects alleged in *Lopez* and *Morrison*. Public self-eradication of its citizenry's discarded trash has

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[9] For a brief general discussion, *see Wikipedia, The Free Encyclopedia*, at http://en.wikipedia.org/wiki/Subsidiarity. *See also, Does Garbage Have Standing, supra*, at 165 n. 21, 202, n. 185 and 203 and accompanying text.

[10] *Const. art. I, § 8, cl. 3.*

[11] In *Lopez* and *Morrison*, the Court emphasized the need to prevent Congress from interfering with "local" areas of "traditional state concern." *See, Lopez*, 514 U.S., at 564-68 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 611-19.

no adverse effect upon commerce "among the states" at all, whereas in *Lopez* and *Morrison* adverse affects were at least arguable.

Community self-management of its waste, like self-management of its crime, fire, local health and schoolchildren's education, should not be viewed as implicating interstate commerce. As such, Congress (at least arguably) is without power to regulate such activity under the affirmative Commerce Clause. *Cf., Wickard v. Fulburn*, 317 U.S. 111 (1942). Moreover, Congress has not sought to exert such power, but in RCRA has expressly deferred to the "primary" State and local role. *See,* 42 U.S.C. § 6901(a)(4). The Court should not extend the dormant Commerce Clause to reach this case.

The Court's dormant Commerce Clause cases invalidating regulation ordinarily involve overt discrimination against interstate business. There is no discrimination against interstate business present in the Oneida-Herkimer system. In fact, there is no discrimination against <u>any</u> business. Citizen dollars, under the flow control ordinance, flow through the temporary possessor of the citizens' waste (the bailee waste collectors) to the lawful waste destination (the public facilities). There is no residency requirement for any of the waste haulers—any company from any state can work in Oneida and Herkimer counties. The citizens' dollars pay for the comprehensive Oneida-Herkimer system of providing recycling, education and economical, environmentally secure waste disposal. To the extent that the system needs to employ the private sector, this is done on a non-discriminatory basis.

Nor is there any "excess burden" on interstate commerce present here, because reduction or elimination of waste must, as a matter of law, be viewed as no burden at all. *Cf., Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 473, n. 17 (1981)(waste reduction as a proper goal of Minnesota's

ban on plastic non-returnable milk containers). Rather, waste reduction is encouraged by federal law, state law, and general principles of environmental law. *See, e.g.*, RCRA subtitle D, 42 U.S.C. subchapter IV. It is like eliminating crime, fire, disease or dental cavities. The people have the right to reduce or eliminate undesirable things. This is a proper governmental activity. If the local citizenry can eradicate all of its waste, entirely, no one has legitimate cause to complain.

This Court must preserve the People's right to local democracy. This Court should not deprive the citizens of Oneida and Herkimer Counties of their right to self-governance over local solid waste. To do so will mean that we citizens of Rockland County will similarly have no power to govern our own solid waste destiny. We too will be deprived of the democracy promised by the Guarantee Clause.

## POINT II

### A PRINCIPLED APPROACH TO MUNICIPAL SOLID WASTE MANAGEMENT— APPLY THE "GOLDEN RULE"

Your *amici*'s counsel wrote a law review article entitled "*Does Garbage Have Standing?*," *supra*, *note 4*, on the subject of flow control prior to this Court's decision in *Carbone*. The article provides a principled constitutional basis for this Court's evaluation of the present case.

Federal law encourages waste reduction and environmentally sound, economically efficient, solid waste management. This requires public sector control over waste. The waste industry profits with increased volume of waste. Conversely, public control over waste that promotes waste reduction and recycling potentially reduces profits of trash disposal companies. Denying the public the ability to control its own trash places the waste industry in charge. The private fox then guards the public henhouse.

Garbage management has been, from prehistoric times, a municipal activity, which federal policy recognizes today as a primarily state and local governmental activity. *Id.*, 11 PACE ENVT'L L. REV. at 161-166. The concept of "home rule" over a community's solid waste is consistent with principles of federalism, the proximity principle of environmental law, and the express provisions of RCRA. *Id.* 168-197. If every community in the nation, and even the world, self-managed its own waste to the maximum extent practical, the world economy and the world environment would benefit. *Id.* 201-208. International trade wars will not result from countries "hoarding" pollution, whether solid waste or otherwise. *Id.* 204-05.

If a foreign country (or a domestic county, such as Sussex, Virginia) wishes to become a "pollution haven," it retains this right to contract with whomever needs to procure its services.

Although your *amici* and their counsel were unfamiliar with the Oneida-Herkimer system when *Does Garbage Have Standing* was written, Respondents' is a system which exemplifies the principled approach set forth in the article. It allows self-rule and self-management of a community's own waste, and export of the waste if this is desired or necessary. It is an approach which this Court can embrace—sensible and easy to apply.

## CONCLUSION

Your *amici* urge that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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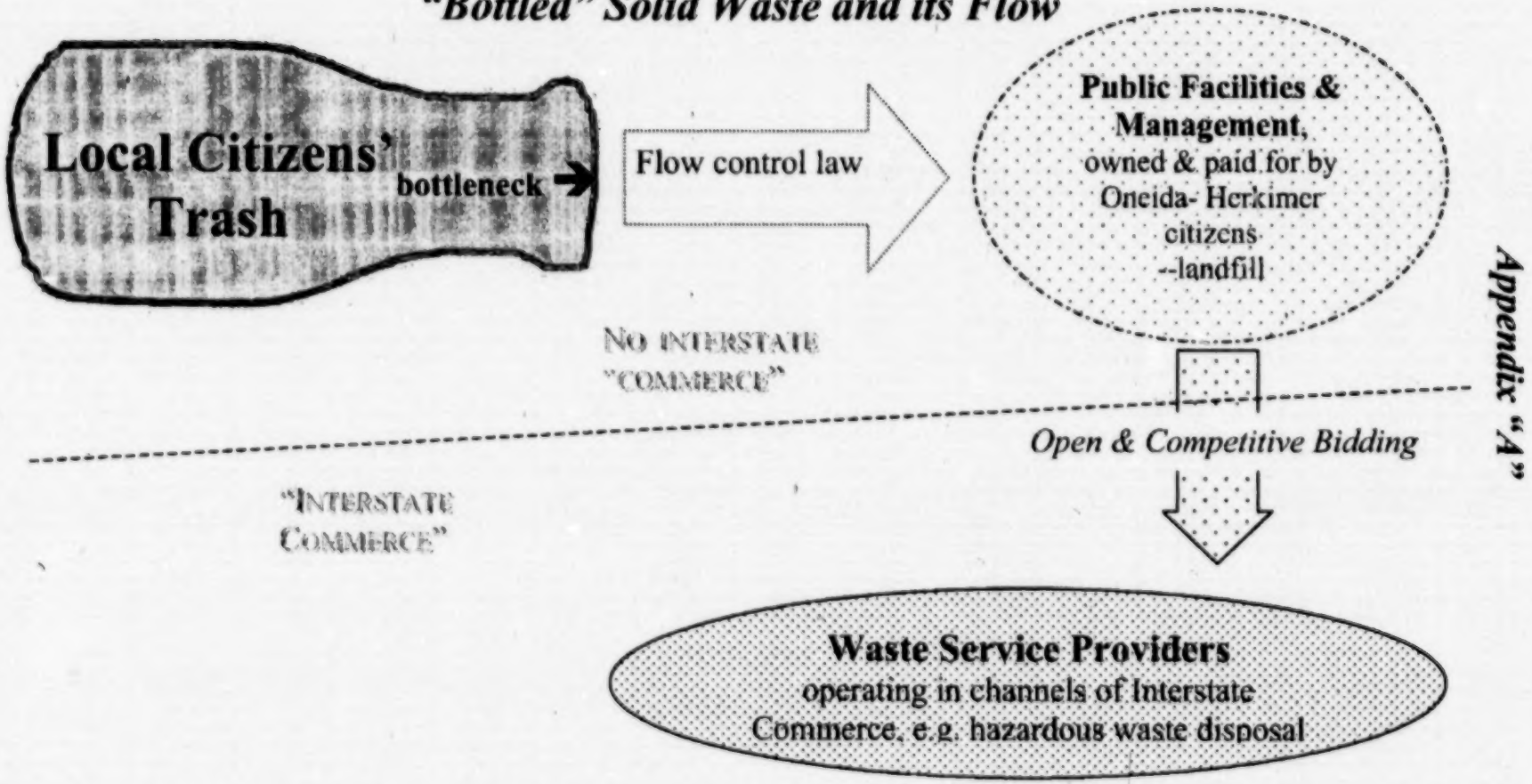
## *"Bottled" Solid Waste and its Flow*




*Appendix "A"*

## *Oneida-Herkimer Waste Flow Diagram*